STATE OF MICHIGAN

COURT OF APPEALS

VERNOR'S DOLLARS DISCOUNT, INC,

Plaintiff-Appellee,

v

FREMONT MUT INS CO, a/k/a FREMONT INS CO,

Defendant-Appellant,

and

DOTY AGENCY, INC,

Defendant.

UNPUBLISHED
February 28, 2008

No. 276541
Wayne Circuit Court
LC No. 03-336003-CK

Before: Wilder, P.J., Saad, C.J., and Smolenski, J.

PER CURIAM.

In this suit to enforce an insurance claim, Fremont Mutual Insurance Company appeals as of right the trial court's grant of summary disposition in favor of Vernor's Dollars Discount, Inc. (VD Discount). The trial court determined that there was no material factual dispute that VD Discount did not make a material misrepresentation on its application for insurance when it indicated that it had not had a loss within the previous three years. Based on this, the trial court denied Fremont Mutual's motion for summary disposition and granted judgment in favor of VD Discount under MCR 2.116(I)(2). We conclude that the trial court should have disregarded VD Discount's separate corporate existence from Zebib, who had suffered a fire loss within the previous three years. Because there was no material factual dispute that VD Discount made a material misrepresentation when it failed to disclose Zebib's prior fire loss, the trial court should have granted summary disposition in favor of Fremont Mutual on that basis. Accordingly, we reverse and remand for entry of summary disposition in favor of Fremont Mutual.

I. Facts and Procedural History

VD Discount operated a type of retail business commonly called a "dollar store." Sarah Zebib testified at her examination under oath that she was the sole owner of VD Discount. Zebib stated that VD Discount was not her first dollar store. Indeed, Zebib indicated that she had had an ownership interest in three separate dollar stores prior to forming VD Discount.

Zebib stated that she first acquired a dollar store with her sister, which operated as Dollars & Cents. Thereafter, in 1997, Zebib's husband started a dollar store. Zebib stated that she had an ownership interest in her husband's store. The store owned by Zebib and her husband suffered two fire losses. In both cases, the insurance companies paid the claims. Zebib stated that she was a payee on both checks.

In 1998, Zebib and her sister purchased an existing dollar store located at 7924 West Vernor. They operated this store through a business called Dollars & Cents II. In 2000, Zebib and her sister agreed to each own and operate one store. Zebib took control of Dollars & Cents II, which store she retained after her divorce.

In August 2000, Dollars & Cents II suffered a fire loss. Zebib stated that the insurance company paid $100,000 based on the claim from the fire. Zebib stated that she used the money to purchase new inventory and moved Dollars and Cents II from 7924 West Vernor to 7946 West Vernor. Dollars & Cents II operated at this location from November 2000 to March 2002. Zebib indicated that the owner of the property located at 7946 West Vernor evicted Dollars & Cents II in March 2002. Zebib stated that, after the eviction, she moved her business equipment and inventory into storage.

In July 2002, Zebib incorporated VD Discount and moved the business equipment and inventory from storage back to the original location of Dollars & Cents II at 7924 West Vernor, which was the same location where Dollars & Cents II experienced its fire loss. Thereafter, VD Discount operated a dollar store from that location. Zebib admitted that VD Discount began operating with the inventory originally purchased by Dollars & Cents II after its fire loss. Zebib also admitted that VD Discount had some of the same employees and the same accountant as Dollars & Cents II.

Zebib stated that she began to look for insurance for VD Discount and eventually contacted an independent insurance agent with the Doty Agency, Inc. by telephone.[1] The agent at Doty filled out an application for insurance from Fremont Mutual based on information provided by Zebib. Zebib stated that she received the first page of the application by fax. Zebib signed the application on November 10, 2002 and said she returned it to Doty.

Although the application was prepared for VD Discount, the name listed on the application was "Vernor's Dollars Discount" rather than "Vernor's Dollars Discount, Inc." And the application identified VD Discount as a partnership. Additionally, Zebib signed the application without indicating her official capacity. On the second page of the application—under the a section titled "insurance history"—the applicant is asked to "list all losses in the last three years." The agent did not list any losses and checked the box labeled "check if no losses." Further, under the section for prior carrier information, the agent did not list any prior carriers. Instead, the agent wrote "new 2002."

[1] After filing its original complaint, VD Discount added Doty as a defendant. However, Doty was later dismissed by stipulation and is not a party to this appeal.

In February 2003, VD Discount suffered a fire loss. After VD Discount filed a claim under its insurance policy, Fremont Mutual investigated the fire. During the investigation, Fremont Mutual learned of the previous fire losses suffered by Zebib's dollar stores.

In July 2003, Fremont Mutual denied the claim. In a letter to Zebib, Fremont Mutual explained that it had learned of the previous fire losses. It noted that the fire loss suffered by Dollars & Cents II occurred within three years of Zebib's application for insurance on behalf of VD Discount. Based on this, Fremont Mutual concluded that Zebib had made a material misrepresentation. Accordingly, Fremont Mutual asserted that the insurance policy was void and there was no coverage for her claim. Fremont Mutual also refunded the premium payments.

In October 2003, VD Discount sued Fremont Mutual for breach of the insurance contract.

In September 2004, Fremont Mutual moved for summary disposition under MCR 2.116(C)(10). Fremont Mutual argued that there was no factual dispute that Zebib had suffered a fire loss within three years of her application for insurance on behalf of VD Discount. Based on this, Fremont Mutual concluded that Zebib's answer that there had been no losses within the last three years constituted a material misrepresentation that voided the insurance contract. Specifically, Fremont Mutual argued that VD Discount was a mere continuation of Dollars & Cents II and, accordingly, Zebib had to disclose the fire loss suffered by Dollars & Cents II in August 2000.

In its answer, VD Discount provided evidence that it was a corporation separate from Dollars & Cents II. Because it was a separate corporation, VD Discount argued that it did not have to disclose the loss suffered by Dollars & Cents II. VD Discount noted that, had Fremont Mutual wanted a loss history based on losses suffered by persons or entities other than VD Discount, it could have specifically inquired about those types of losses. But Fremont Mutual elected only to inquire about losses suffered by the applicant, which was VD Discount. VD Discount argued that, because its assertion that it had not suffered any losses within the last three years was accurate, the trial court should deny Fremont Mutual's request for summary disposition. VD Discount also asked the trial court to grant judgment in its favor under MCR 2.116(I)(2).

In its reply, Fremont Mutual argued that the trial court should disregard the separate existence of VD Discount and treat it as a continuation of Dollars & Cents II. Fremont Mutual contended that, based on the evidence, the corporate entities formed by Zebib were nothing more than alter egos for Zebib. Fremont Mutual further stated that Zebib likely used a separate corporate form to avoid having to disclose her prior fire losses and that it would work an injustice if the trial court did not treat VD Discount as a mere continuation of Dollars & Cents II.

The trial court heard oral arguments on Fremont Mutual's motion in November 2004. At the hearing, the court did not directly address Fremont Mutual's contention that the court should disregard VD Discount's separate existence. Instead, the court noted that there was no material question of fact that the "most recent corporation answered the question truthfully." The court also noted:

> If Fremont was concerned that that parties might abuse corporate formalities, [and] hide loss histories[,] it simply could have asked more closing

> questions, the questions could have been directed to the shareholders of the business in terms of whether they had in their individual capacity been involved in any fire losses and so forth, and obviously they could have made the call as to whether or not they would take on the risk of insuring this particular corporation in light of the shareholder history of prior claims.

After these statements, the trial court denied Fremont Mutual's motion for summary disposition and granted judgment in favor of VD Discount.

This appeal followed.

II. Analysis

Fremont Mutual first argues that the trial court erred when it failed to grant Fremont Mutual's motion for summary disposition under MCR 2.116(C)(10). Specifically, Fremont Mutual contends that the failure to disclose the fire loss suffered by Dollars & Cents II on VD Discount's application for insurance constituted a material misrepresentation that voided the insurance contract. We agree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *State Farm Fire & Casualty Co v Corby Energy Services, Inc*, 271 Mich App 480, 482; 722 NW2d 906 (2006). A decision to disregard a corporation's separate existence involves equitable matters. *Brown Bros Equipment Co v State Hwy Comm*, 51 Mich App 448, 453; 215 NW2d 591 (1974). And this Court reviews de novo a trial court's ultimate decision regarding equitable matters. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich App 33, 40; 700 NW2d 364 (2005).

As a general rule, insurers may avoid liability on an insurance policy if the insured misrepresented a fact material to the risk when procuring the insurance. *Keys v Pace*, 358 Mich 74, 82-83; 99 NW2d 547 (1959); see also MCL 500.2218. A misrepresentation is not material "unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make the contract." MCL 500.2218(1).

In the present case, the parties do not dispute that Fremont Mutual would not have insured VD Discount had it known about the fire loss suffered by Dollars & Cents II. And it is also undisputed that VD Discount did not disclose that fire loss. Hence, if VD Discount had an obligation to disclose the fire loss suffered by Dollars & Cents II, the failure to make that disclosure would constitute a material misrepresentation that voided the insurance contract. *Keys*, *supra* at 82-83.

When read in context, it is plain that the question on the application regarding previous losses applied only to losses suffered by the applicant. Notwithstanding the fact that VD Discount was misidentified on the application as a partnership, it is also clear that the applicant was VD Discount. Further, it is undisputed that VD Discount—to the extent that it was a separate entity—did not suffer a loss within three years of its application for insurance with Fremont Mutual. And, because the question about prior losses did not plainly include losses suffered by individual shareholders or other entities owned by the shareholders, VD Discount did not have a duty to volunteer information about the prior fire loss suffered by Dollars & Cents II.

See *Federal Land Bank v Edwards*, 262 Mich 180, 185; 247 NW 147 (1933) ("The insurer is assumed to know the extent of the information desired, and to seek it, and cannot avoid liability by claiming that there was concealment . . . when it did not ask about [the] matter and called for no such information in its written application."). Accordingly, if the trial court properly determined that VD Discount should be treated as an entity separate from both Zebib and Dollars & Cents II, VD Discount cannot be said to have misrepresented its loss history.

Michigan courts will generally respect the separate existence of corporate entities. *Wells v Firestone Co*, 421 Mich 641, 650; 364 NW2d 670 (1984). This is true even where one person owns all the corporation's stock. *Kline v Kline*, 104 Mich App 700, 702; 305 NW2d 297 (1981). But courts will disregard the separate existence when it is "used to defeat public convenience, justify wrong, protect fraud, or defend crime." *Paul v University Motor Sales Co*, 283 Mich 587, 602; 278 NW 714 (1938). Although disregarding the separate existence of a corporation—referred to as piercing the corporate veil—is most often done to protect a corporation's creditors, Michigan courts have recognized that the doctrine may be invoked to protect others when the equities are compelling. *Wells*, *supra* at 650-651. The equities will typically justify disregarding the separate existence of a corporate entity where (1) the entity is a mere instrumentality of another individual or entity, (2) the entity was used to commit a wrong or fraud,[2] and (3) there was an unjust injury or loss. See *Rymal v Baergen*, 262 Mich App 274, 293-294; 686 NW2d 241 (2004).

In the present case, there was undisputed evidence that VD Discount was a mere instrumentality of Zebib. In fact there was significant evidence that Zebib herself did not take VD Discount's separate existence seriously. When asked if she had a business prior to VD Discount, Zebib characterized VD Discount as the same business as Dollars & Cents II, albeit with a different name. Zebib explained that she wanted to avoid the "bad luck" associated with Dollars & Cents II; so she asked her accountant to change the name. Further, when applying for insurance with Fremont Mutual, Zebib failed to correct the erroneous identification of VD Discount as a partnership and signed the application without identifying the nature of her

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[2] Although many courts have stated that the entity must be used to commit a wrong or fraud before the entity's separate existence may be disregarded, see *Rymal*, *supra* at 293, it is not clear that this is a necessary prerequisite to disregarding a corporation's separate existence. Most of these cases rely on a line of authorities that originate with *Gledhill v Fisher & Co*, 272 Mich 353; 262 NW 371 (1935). But after the decision in *Gledhill*, our Supreme Court explained that proof of fraud is not a prerequisite for disregarding the separate existence of a corporate entity. See *Herman v Mobile Homes Corp*, 317 Mich 233, 243-245; 26 NW2d 757 (1947) (distinguishing *Gledhill*, *supra* and holding that a corporation's separate existence may be disregarded where the corporation is so dominated by another that it should be treated as a mere agent of its parent). See also *Papo v Aglo Restaurants*, 149 Mich App 285, 302 n 15; 386 NW2d 177 (1986) (noting that our Supreme Court, "on more than one occasion, has acknowledged that the corporate veil may be pierced in the absence of fraud."). However, because the undisputed facts support the conclusion that Zebib used VD Discount's separate existence to commit a wrong—namely, to avoid having to disclose her prior history with fire losses—we need not determine whether Fremont Mutual would have been entitled to relief without being able to show that Zebib used VD Discount to commit a wrong.

relationship to VD Discount. Hence, on the application, it appears that Zebib signed in her individual capacity rather than as an officer of a corporation.

There was also undisputed evidence that Zebib did not observe any corporate formalities with regard to her control of Dollars & Cents II and VD Discount. Indeed, the evidence indicated that Zebib abruptly decided to cease operating Dollars & Cents II and then caused VD Discount to begin operations in its place. In addition to her common ownership of VD Discount and Dollars & Cents II, Zebib admitted that VD Discount had some of the same employees and used the same accountant. She also admitted the VD Discount began operations with the inventory previously owned by Dollars & Cents II. Yet she presented no evidence that this was a good faith transfer of assets for value from Dollars & Cents II to VD Discount. She also admitted that VD Discount began operations in the same location vacated by Dollars & Cents II after its fire loss. When asked what she felt differentiated VD Discount from Dollars & Cents II, Zebib could only state that the businesses were different entities and that VD Discount had a new longer lease and had fixed up the lease location. Based on all this undisputed evidence, we conclude that there was no material factual dispute that VD Discount was a mere instrumentality of Zebib. *Rymal*, *supra* at 293-294.

There was also undisputed evidence that suggests that Zebib used VD Discount's separate corporate existence to insulate herself from having to disclose her prior involvement with fire losses. Despite the evidence that Zebib disregarded the separate existence of Dollars & Cents II and VD Discount during their operations, she clearly relied on VD Discount's separate existence when she applied for insurance. The application indicated that VD Discount had no prior insurance history, ostensibly because it was "new 2002." The application also indicated that VD Discount had no prior losses within three years despite the fact that Zebib herself admitted to having a fire loss. Given that Zebib failed to honor the separate existence of her own businesses, it is telling that she implicitly relied on VD Discount's separate existence when answering the questions regarding prior losses. Indeed, Zebib admitted that she had had experience with fire losses and had been the payee on the settlement of claims arising from prior fire losses. She further stated that she consistently shopped around to obtain the best rates on insurance. These experiences combined with her reliance on VD Discount's separate existence when applying for insurance, strongly suggest that Zebib used VD Discount's separate existence to obtain insurance without having to disclose her history with fire losses. Therefore, we conclude that there was no factual dispute that Zebib wrongfully used VD Discount's separate existence to obtain insurance without having to disclose her prior history with fire losses. *Id.*

Finally, given the undisputed evidence that Fremont Mutual would not have insured VD Discount had it known about the prior fire loss suffered by Dollars & Cents II, we conclude that it would be unjust to compel Fremont Mutual to pay a substantial loss claim solely because it did not anticipate that an owner might shield herself from having to disclose her prior loss history by forming a separate entity. *Id.* Therefore, the trial court should have disregarded the separate existence of VD Discount from Zebib.

III. Conclusion

On de novo review of the record, we conclude that there was no material factual dispute that VD Discount was a mere instrumentality of Zebib, that she used its separate corporate existence—at least in part—to wrongfully obtain insurance, and that this wrong unjustly caused

Fremont Mutual to agree to extend coverage to Zebib's business. For these reasons, the trial court should have disregarded VD Discount's separate existence from Zebib. Further, because Zebib admitted that she had had a prior fire loss within three years of the application for insurance to Fremont Mutual, the failure to disclose that loss on the application constituted a material misrepresentation that voided the insurance contract. *Keys, supra* at 82-83. Consequently, the trial court erred when it failed to grant summary disposition in favor of Fremont Mutual on that basis.

Because of our resolution of this issue, we decline to address Fremont Mutual's remaining arguments on appeal.

Reversed and remanded for entry of summary disposition in favor of Fremont Mutual. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Michael R. Smolenski